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CASE CITED

Steiner, Inc. v. Hill, 52 Or. Adv. Sh. 57 and 745, 226 P. 2d 307, 230 P. 2d 537 6

IN THE

Supreme Court of the United States

October Term, 1950

No. 760

HUGO V. LOEWI, Inc., a Corporation,

Petitioner,

vs.

KILIAN W. SMITH.

On petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum of decision (R. 46) and the findings of fact and conclusions of law (R. 47-56) by the District Court are not reported. The opinion of the Court of Appeals (R. 367) is reported in 186 F. 2d 858, and on denial of rehearing (R. 377-378) in 188 F. 2d 160.

The opinions in the two companion cases that were tried and appealed with this case on a consoli-

dated record are also material here: *Hugo V. Loewi, Inc. v. Geschwill,* 186 F. 2d 849, rehearing denied 188 F. 2d 366 (petition for writ of certiorari, No. 759); and *John I. Haas, Inc. v. Wellman,* 186 F. 2d 862 (no petition for writ of certiorari).

JURISDICTION

The judgment of the Court of Appeals was entered January 31, 1951 (R. 376). A petition for rehearing was denied on April 18, 1951 (R. 377). The petition for a writ of certiorari was filed May 25, 1951. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's findings of fact that the hop grower duly performed the contract (including tender of hops meeting the contract specifications), which are supported by substantial evidence, should be reviewed by this Court.

2. Whether the decisions of the two lower courts conflict with a recent opinion of the Oregon Supreme Court on a matter of local law, where the Oregon court has in a later opinion expressly recognized that there is no such conflict.

3. Whether upon the contract and the facts the correct measure of recovery was allowed under Oregon law.

STATUTES INVOLVED

The pertinent provisions of the Oregon statutes on the merits, in addition to those cited by petitioner, are printed in Appendix A to respondent's brief in opposition in the companion case, No. 759.

STATEMENT

During harvest season in 1947 petitioner hop buyer contracted for the purchase of the entire crop of late cluster hops, and the remainder of the crop of fuggle hops, produced by plaintiff hop grower on his farm in Marion County, Oregon (R. 48-49). The buyer accepted and shipped out the fuggle hops but did not pay the balance due for that crop (R. 49). The buyer purported to reject the crop of late cluster hops, claiming deficient quality (R. 53). The contract also constituted a chattel mortgage to secure the buyer's advance payment (R. 50). The cluster hops were not resold by the grower (R. 129).

The complaint is in two causes of action: One for the price of the cluster crop less advance payment; the second for the price of the fuggle crop less advance payment (R. 2-9). The District Court allowed the recovery prayed for (R. 54-55).

The controversy here involves the cluster crop. The only dispute as to the fuggle crop is secondary: whether, if there should be no recovery for the cluster crop, the cluster advance should be deducted from the balance due on the fuggle crop.

The determinative facts appear in the trial court's findings (R. 47-54) and in the opinions of the Court of Appeals, cited above. Those facts are not fully reiterated here. The following are particular matters which we believe are inadequately or incorrectly described in petitioner's statement.

1. Both parties waived jury trial, and the issues were tried by the court. On trial it appeared that this action and the two companion cases (cited above) involved common questions of law and fact. Accordingly the parties consented and the District Court ordered that the three actions be tried jointly and that the evidence in each would be deemed to have been taken and would be considered in the others, to the extent material (R. 47-48, No. 759 R. 504). The three cases were considered by the Court of Appeals on a consolidated record (R. 81-82, 352-353, 354-357, 367). The large number of documentary exhibits were considered by the appellate court in their original form, without being printed (R. 346-347). The testimony printed in one case was considered, without being reprinted, in the others (R. 354-355, 357).

2. The basic theory of the petition is that the evidence and findings show something materially less than due compliance with the quality provisions of the contract.

The buyer purported to reject the cluster hops on the specific claims that they were "dirty picked"

and "blighted" (R. 53). The claim of "dirty picked" meant that the leaf and stem content supposedly was in excess of the tolerance allowed by the contract (R. 53, 314). The claim of "blighted" meant that the hops showed "mildew" (R. 53, 318).

The petition (p. 7) assumes an "admitted fact" that the hop crop was affected by "mold." This is not supported by the record. There is some evidence that the cluster crop showed "mildew." "Mold" is specifically mentioned in the contractual warranty, while "mildew" is not (R. 11).[1]

The District Court's findings on the quality issue, resolving the conflicts in the evidence, may be condensed as follows: The grower duly performed all of the terms and conditions of the agreement between the parties on his part to be performed (R. 51-52).[2] The grower did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state and delivered the same in warehouse (R. 51). Petitioner did not rely upon any warranty or representation, whether contained in the contract or otherwise, that the crop would be any different in condition or quality than it actually was when tendered and delivered (R. 54). Petitioner refused to pay for the hop crop on the

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1. As to the distinction between "mold" and "mildew," reference is made to respondent's brief in the companion case No. 759, footnote 2, page 5.

2. As to the use of the terms "substantially conformed" and "merchantable" elsewhere in the trial court's findings, reference is made to respondent's brief in the companion case (No. 759), footnote 3, page 6.

particular grounds that the hops were "blighted" (*i.e.*, showed some mildew effect) and "dirty picked" (*i.e.*, had too much leaf and stem content), and on no other specific ground (R. 53). Upon the facts neither claimed defect was material (R. 53).

The Court of Appeals held (R. 375): "The findings are supported by substantial evidence and no reversible error was committed."

3. While these companion cases were before the Court of Appeals, the Oregon Supreme Court handed down its first opinion in another hop case: *Steiner, Inc. v. Hill,* 52 Or. Adv. Sh. 57, 226 P. 2d 307. The Court of Appeals distinguished the state court case upon the ground that it, unlike these cases, turned upon the pleading and proof of waiver or estoppel, and also upon the ground that there were material differences in the facts (R. 373-374). The petition, however, states (pp. 5, 7) that the decision of the Court of Appeals here is in direct conflict with the state court decision.

In its opinion on rehearing in *Steiner, Inc. v. Hill,* 52 Or. Adv. Sh. 745, 230 P. 2d 537, the Oregon court expressly recognized that there was no such conflict, and adopted the distinction made by the Court of Appeals. The Oregon court said (52 Or. Adv. Sh. at 750-751, 230 P. 2d at 540):

> "We have examined and considered the opinions in the following cases rendered on January 31, 1951, by the United States Court of Appeals

for the Ninth Circuit; *Hugo V. Loewi, Inc. v. Geschwill,* 186 F. 2d 849; *Hugo V. Loewi, Inc. v. Smith,* 186 F. 2d 858; and *John I. Haas, Inc. v. Wellman,* 186 F. 2d 862. These constitute a series of cases all involving contracts for the purchase and sale of hops grown in the Willamette Valley in the year 1947. Although these cases are common to the case at bar in that they involved hop contracts for the purchase and sale of hops and wherein the question of 'mildew' was an issue, they are unlike the one before us in that in none of them did the grower concede a quality defect, as here, and plead waiver or estoppel as a defense. In the *Hugo V. Loewi, Inc. v. Smith* case, our first opinion was cited to the court, where it was reviewed and disposed of by Judge Bone with the observation:

" 'It is our view, and apparently the view of the appellant, that there was no finding of waiver or estoppel by the trial court in the instant case. Therefore, the cited case is not germane to any issue before us * * *.'

"Beyond that, neither waiver nor estoppel is discussed in any of these recent federal cases, and they are of no aid here."

ARGUMENT

Respondent respectfully refers to the argument submitted by the respondent in the companion case, No. 759. In that case the hops were sold by stipulation of the parties after the action was commenced. In this case the hops continued to be held

by the warehouseman (R. 53). We believe that this difference in the facts is not controlling, and that the principles relied upon in respondent's brief in the companion case are equally applicable here.

CONCLUSION

The decision below turns upon the particular facts of the case and presents no question calling for further review by this Court. There is no conflict in decisions. The petition should therefore be denied.

Respectfully submitted,

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June, 1951